THE MATTER OF ARBITRATION BETWEEN

STATE RESIDENTIAL SCHOOLS EDUCATION ASSOCIATION,	)	
Union,	)	
and	)	**WORKING DURING SCHOOL BREAKS GRIEVANCE**
STATE OF MINNESOTA (Crosswinds and Perpich Center Schools),	)	
Employer.	)	**BMS Case No. 16-PA-0068**

Arbitrator:	Stephen F. Befort
Hearing Date:	February 10, 2016
Post-hearing briefs received:	March 14, 2016
Date of Decision:	April 8, 2016
	APPEARANCES
For the Union:	Debra M. Corhouse
For the Employer:	Chrisanne L. Nelson

INTRODUCTION

State Residential Schools Education Association (Union), as exclusive representative, brings these consolidated grievances claiming that the State of Minnesota, acting through Crosswinds Arts and Science School and Perpich Center for Arts Education School (Employer), violated the parties' collective bargaining agreement by eliminating the ability of teachers to

work for pay during school break periods. The Employer contends that this change in practice was consistent with its inherent management authority. The grievance proceeded to an arbitration hearing at which the parties were afforded the opportunity to present evidence through the testimony of witnesses and the introduction of exhibits.

ISSUES

1. Did the Employer violate the parties' collective bargaining agreement when it eliminated the ability of teachers at Crosswinds and Perpich schools to work for pay during school break periods?

2. If so, what is the remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE 19 – VACATION LEAVE

Section 3. Vacation Usage

A. . . . Unused vacation accrual shall normally be paid in cash at the end of the academic school year unless a carry-over is mutually agreed to by the Appointing Authority and the teacher.

ARTICLE 25 – SALARIES

Section 1. Salary Schedule. . The salary schedule set forth in Appendix C-1 is effective July 1, 2013 through June 30, 2014. The salary schedule set forth in Appendix C-2 is effective July 1, 2014 through June 30, 2015.

Section 2. Conversion. Effective July 1, 2013, all teachers shall be assigned to the same relative step within the salary range for their respective lanes as specified in Appendix C-1, except as set forth below.

Teachers who are paid at a rate which exceeds the maximum rate established for their lane prior to implementation of this Agreement, but whose rate falls within the new range for their lane, shall be assigned to the maximum of the new range.

In the event the July 1, 2013 maximum rate set forth in Appendix C-1 is equal to or less than the teacher's salary as of June 30, 2013, no adjustment shall be made, but teachers assigned to these lanes shall suffer no reduction in pay.

Section 3. First Year Wage Adjustment. Effective July 1, 2013, all salary ranges and rates shall be increased by three percent (3%) rounded to the nearest cent. Teachers shall convert to the new salary schedule as provided in Section 2.

Section 4. Second Year Wage Adjustment. Effective July 1, 2014, all salary ranges and rates shall be increased by three percent (3%), rounded to the nearest cent.

Effective July 1, 2014, all teachers shall receive this increase including those teachers whose rates of pay exceed the maximum rate for their lane. Joint Exhibit 1.

[Appendix C sets out a compensation grid expressed in hourly rates of pay.]

ARTICLE 30 – MANAGEMENT RIGHTS

It is recognized that, except as expressly stated herein, the Employer shall retain whatever rights and authority are necessary for it to operate and direct the affairs of the Employer in all of its various aspects, including but not limited to, the educational policies of the Employer; the right to direct the teachers; to plan, direct and control all operations and services of the Employer; to determine the methods, means, organization, and number of personnel by which such operations and services are to be conducted; to assign teachers; to transfer teachers; to schedule working hours; . . . Any term and condition of employment not specifically established by this Agreement shall remain solely within the discretion of the Employer to modify, establish, or eliminate.

APPENDIX J – SUPPLEMENTAL AGREEMENT

THE PERPICH CENTER FOR ARTS EDUCATION

ARTICLE 5: Vacation Leave

Mandatory vacation leave that teachers are required to take during official school breaks shall not exceed five (5) days per academic year. The Appointing Authority shall notify the Local Association no later than March 1 of each fiscal year if it will be requiring the use of vacation during official school breaks. This requirement is effective for the term of the 2013-2015 Agreement.

FACTUAL BACKGROUND

The State of Minnesota operates the two schools involved in these grievances. The Perpich Center for Arts Education (Perpich) is an arts-centered school with a nine-month academic calendar. Perpich serves students in the 11th and 12th grades, some of whom live in on-campus dormitories, and it employs 28 teachers. Crosswinds Arts and Science School (Crosswinds) is a public integration magnet school that serves students in grades six through ten. Crosswinds operates year-round and has 16 teachers. The State took over operation of Crosswinds in 2013. Both schools are covered by the same collective bargaining agreement.

On April 28, 2015, representatives of Crosswinds and the Union held a meet and confer session relating to the school calendar in which the Employer informed the Union that Crosswinds teachers would not be permitted during the 2015-16 school year to work on so-called gray days which are week days on which school is not scheduled. The Union filed a grievance on May 12, 2015 alleging that this change would deprive Crosswinds teachers of approximately 14 previously compensated work days each year.

On May 28, 2015, Perpich Principal Antwan Harris sent an email message to Perpich faculty "clarifying" that they would no longer be in pay status during winter and spring breaks and that they would be required to use accrued vacation time if they desired pay during such periods. The email message stated:

> I am writing to provide clarification around the school breaks. Teachers <u>are not scheduled</u> to work during the winter and spring breaks unless approved by me in writing. Approval to work during these breaks will be evaluated on a case-by-case basis. The winter and spring breaks are the times for you to take a vacation. . . . If you do not want to use your vacation during these breaks, then it is time without pay.

(Emphasis in original.)

At the arbitration hearing, Principal Harris testified to his belief that teachers should not be in pay status during periods in which students are not in the classroom. Principal Harris's email message nonetheless invited Perpich faculty to propose paid duty for specific work tasks during the winter break. The testimony provided at the hearing indicated that Principal Harris approved almost all of the requested work time proposed by the Perpich faculty for the 2015-16 winter break period. The Union filed a grievance challenging the Principal's policy on the same day that it was announced.

At the arbitration hearing, the Union elicited testimony from teachers concerning the work practices that existed prior to these two policy announcements. Two witnesses testified that the Employer had long expected Perpich teachers to work during winter and spring breaks. JoAnn Winter testified that when she began teaching at Perpich in 1990, she was told that, as a state employee, she was expected to work during winter break. She testified that during her tenure from 1990 to 2003, teachers were expected to work for pay during breaks, consisting of a total of 12 paid days, unless they submitted a request for vacation.

Joao Bichinho similarly testified that when he began work at Perpich in 1992, he was told that he was expected to work during breaks unless permission was given for time off. He testified that teachers worked on a variety of tasks during winter break, including grading, preparing for the new term, and writing college recommendation letters.

Both Winter and Bichinho testified that at some point, the Employer informed Perpich faculty that they must use eleven days of vacation during the winter break. Beginning with the 2001-03 contract, this mandate was expressly reduced to five days. Mr. Bichinho testified that

the Employer has not enforced this mandate in recent years and that Perpich teachers have continued to work for pay during school break periods.

Another teacher – Jeff Pridie – testified that when he began work at Crosswinds during the 2014-15 school year, the school expected teachers to work during break periods. He testified that the Employer's 2015 change in policy has reduced pay for approximately 16 "gray" days without correspondingly reducing teacher work responsibilities. Ms. Winter similarly testified that since the State took over the operation of Crosswinds in 2013, Crosswinds teachers were permitted to work for pay during school breaks

Assistant State Negotiator Carolyn Trevis, from Minnesota Management and Budget (MMB), served as the chief state representative of the SRSEA unit from 1999 to 2014. She testified at the hearing that she was not aware that Perpich teachers worked for pay over school break periods until the grievances in this matter were filed in 2015.

POSITIONS OF THE PARTIES

Union

The Union initially asserts that its grievances are not challenging the Employer's right to establish the school calendar or the length of break periods, but instead are challenging the Employer's right to extinguish the right of teachers to work for pay during school breaks. With respect to that issue, the Union maintains the existence of a longstanding past practice by which unit teachers were expected and permitted to work for pay during school break periods. The Union points out that the only limitation expressed in the parties' collective bargaining agreement on that right is a provision which authorizes the Employer to require teachers to take up to five mandatory vacation days per academic year. The Union argues that the Employer's

unilateral change in policy significantly reduces teacher pay beyond that contractual limitation without implementing a corresponding reduction in teacher work expectations.

Employer

The Employer contends that it has the inherent management right to set the school calendar and to schedule working hours. The Employer points out that no provision of the parties' collective bargaining agreement limits the Employer's managerial authority to reduce the number of paid work days. Finally, the Employer argues that the Union's past practice argument should fail because Minnesota Management and Budget, the statutory employer of the employees in question, was not aware of the alleged paid work during breaks practice.

DISCUSSION AND OPINION

Management Rights

The Employer's principal contention is that its change of policy concerns the school calendar and the scheduling of work – matters over which it has full managerial authority. The Employer finds this authority grounded in both statute, Minn. Stat. § 179A.07, subd. 1, and in the management rights clause set out in article 30 of the parties' collective bargaining agreement.

As an initial mater, I do not think that the Employer's action constituted a change in the school calendar. The Employer's change in policy impacted only break periods and did not alter the schedule of instructional days.

But, the Employer's action did constitute the scheduling of work. The conduct at issue in this matter is the removal of break days from the schedule of paid work days. This

action is clearly within the scope of the rights retained by article 30 which expressly references the employer's ability to "schedule working hours."

The management rights clause additionally provides that "any term and condition of employment not specifically established by this Agreement shall remain solely within the discretion of the Employer to modify, establish, or eliminate." In this regard, the Employer is correct in pointing out that nothing contained in the contract limits the Employer's authority to establish or modify the schedule of work days. Accordingly, the Employer's action in eliminating break days from the schedule of paid work days is presumptively permissible.

Past Practice

The Union counters with the argument that the parties have adhered to a longstanding past practice by which unit teachers were permitted to work for pay during school break periods. Four teachers testified to such a practice, with two teachers testifying that the practice has been in existence for more than 20 years. The Union argues that this past practice is binding and effectively rebuts the management rights presumption.

It is well-recognized that a clear and well-established course of past practice may provide significant guidance in interpreting the terms of a collective bargaining agreement. A "past practice" arises from a pattern of conduct that is clear, consistent, long-lived, and mutually accepted by the parties. Richard Mittenthal, *Past Practice and the Administration of the Agreement*, 59 MICH. L. REV. 1017 (1961). A practice that comports with these factors generally is binding on the parties and enforceable under contract grievance procedures. *See* ELKOURI & ELKOURI, HOW ARBITRATION WORKS 12-1 to 12-28 (7th ed. 2012).

The facts of these grievances appear to fit within the parameters of a past practice. The practice of teachers working during break periods for pay is clearly established and longstanding.

The Employer asserts two arguments in support of its claim that no binding past practice should be recognized in this instances. As a first objection, the Employer claims that evidence of past practice is only relevant to guide the interpretation of ambiguous contract language, and that here, the relevant contract language is straightforward. I find this objection to be misguided in that it is well accepted that evidence of a past practice can also serve to fill gaps in contract language. *See* ELKOURI AND ELKOURI, HOW ARBITRATION WORKS, 12-1, 12-27-28 (7th ed. 2012). Since the contract does not specify whether or not unit teachers have the right to work for pay during school break periods, the past practice properly serves the purpose of filling this gap in contract coverage.

Second, the Employer contends that it did not acquiesce in the purported past practice because it was not aware of its existence. The Employer points to two pieces of evidence in support of this contention. The Employer first cites to a decision of Arbitrator Thomas Gallagher finding that a practice can bind a state unit only if it was accepted with the knowledge of the statutory employer. Minnesota Association of Professional Employees and State of Minnesota, Department of Natural Resources and Department of Labor and Industry, (Gallagher, 1991). Currently, Minnesota law defines the employer of state employees as Minnesota Management and Budget (MMB). The Employer argues that this ruling should be followed in this instance since MMB Assistant State Negotiator

Carolyn Trevis, who has served as the Employer's principal labor representative since 1999, testified that she was not aware of the past practice urged by the Union.

I do not believe that Ms. Trevis' testimony negates the alleged past practice. As the leading treatise on labor arbitration states, the mutual acceptance of a past practice may be implicitly inferred from the circumstances. ELKOURI AND ELKOURI, HOW ARBITRATION WORKS, 12-7 (7th ed. 2012). In this instance, the unrefuted testimony establishes the existence of a clear practice that has existed for at least 25 years. This practice, accordingly, began at least eight years prior to Ms. Trevis' tenure as labor representative. Under these circumstances, it strains credulity to believe that those administrators responsible for the operation of Perpich and Crosswinds did not know that their teachers were working for pay during school breaks. If they were not aware of such a practice, they should have been.

In sum, the Union has established the existence of a binding past practice that entitles unit teachers to work for pay during break periods. As such, the Employer may not unilaterally terminate this practice without engaging in the collective bargaining process.

Remedy

One remedy for the Employer's violation is an affirmative order to permit unit teachers to work for pay during break periods in future years. This directive, however, is tempered in two respects. First, the Supplemental Agreement to the parties' contract provides that the Employer can require teachers to take up to five days of mandatory vacation leave during school breaks periods each year. Second, the Employer may take reasonable steps to ensure that teachers claiming paid work time during school breaks are actually devoting that time to work activities that benefit the Employer.

That leaves the issue of compensatory pay. Since the Employer permitted Perpich teachers to work for pay on approved projects during the 2015-16 winter break, those teachers did not incur any loss of pay. On the other hand, the Employer did not permit Crosswinds teachers to work during the 2015 school break. Accordingly, those teachers did suffer an actual loss of pay. But the Employer also experienced a loss of work effort during that period. Under the circumstances, an appropriate remedy is for the Employer to compensate Crosswinds teachers for one-half of the lost days of potential work, which amounts to eight paid work days.

AWARD

The grievance is sustained. The Employer is directed to permit unit teachers to work for pay during school break periods going forward. The Employer also is directed to provide Crosswinds teachers with pay for eight days of lost work at their 2015 rate of pay.

Dated: April 8, 2016

_____

Stephen F. Befort
Arbitrator